Filed 1/31/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PAULO JOSE DE OLIVEIRA et al., Plaintiffs and Appellants, v. BEN ZEINATY etc. et al., Defendants and Respondents.	B151719 (Super. Ct. Nos. BC211916 c/w BC211917, BC211919, BC211921)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

Haas & Najarian and Andrew R. Wiener for Plaintiffs and Appellants.

Clements & Knock and Rick H. Knock for Defendants and Respondents.

INTRODUCTION

Plaintiffs Paulo Jose de Oliveira, Carla Maria Correia, Ferreira da Mata, Aracy Marques da Cruz and Sandra Jose Brito Basso de Oliveira purport to appeal from an order granting summary judgment in favor of Ben Zeinaty, doing business as Active Towing, and Charles McKnight. It has long been settled, and oft repeated, that an order granting summary judgment is not appealable (*Modica v. Merin* (1991) 234 Cal.App.3d 1072, 1073; *Cohen v. Equitable Life Assurance Society* (1987) 196 Cal.App.3d 669, 671) and, without an appealable order, this court must dismiss the appeal for lack of jurisdiction (*Olson v. Cory* (1983) 35 Cal.3d 390, 398). To save the appeal in the interests of justice, however, we may construe the order granting summary judgment as incorporating a judgment dismissing defendants from the action. (*Modica*, *supra*, at pp. 1073-1074; *Cohen*, *supra*, at p. 671.) We affirm the judgment.

STATEMENT OF FACTS

In 1990, Ben Zeinaty doing business as Active Towing (Active Towing), became a voluntary participant in the California Highway Patrol's Rotation Tow Program under a Tow Service Agreement. The Tow Service Agreement "contain[ed] rules and regulations that a company agrees to comply with in order to receive a rotation tow listing with the California Highway Patrol (CHP)." It provided that a company participating in the program does not have "a contractual relationship with the CHP and is not acting as an agent for the CHP or the State of California." It required participants to attend annual meetings "to discuss issues concerning the tow rotation."

The Tow Service Agreement itself has no provisions regarding participants encountering intoxicated drivers while participating in the program. Active Towing's unwritten policy was that if a tow truck driver encountered an intoxicated driver while on

a service call, the tow truck driver should not provide service but instead should contact the CHP.

Defendant Charles McKnight (McKnight) has been a tow truck driver since 1993 and has worked for Active Towing since April 1997. He confirmed that he was verbally instructed by his supervisor at Active Towing that "[w]hen you deal with a drunk driver you do not perform service, you call the California Highway Patrol and stay on the scene and wait for the California Highway Patrol to arrive." He was told this was what the CHP wanted tow truck drivers to do.

McKnight never received instruction from the CHP as to how to determine if a driver was intoxicated. He looked for such signs as the way a driver walked if he or she was out of the car, or slurred speech.

At about 4:00 a.m. on June 15, 1998, McKnight responded to a service call on Interstate 15 about 15 miles south of Baker. Manuel F. Lucero's (Lucero) Ford van was stopped at the side of the road. Lucero told McKnight the van had a loose or broken wire in its alternator and requested a jump start. McKnight jumpstarted the van for him. Lucero did not have the correct change to pay for the service call; he had only $100 bills. He drove approximately three miles to a store by the next off-ramp in order to get the correct change. McKnight followed Lucero there in his tow truck.

According to McKnight, he was with Lucero on the service call for about 15 minutes. They spoke together for several minutes, talking about what was wrong with the van and chatting while McKnight worked. During this time, McKnight did not notice anything that would indicate that Lucero was intoxicated. Lucero did not smell of alcohol; his speech was not slurred; he had no difficulty walking or standing. Rather, Lucero appeared to be sober. When McKnight followed Lucero to the store, he noticed nothing unusual about Lucero's driving.

According to Lucero, he was on his way from Temple City to Baker. His girlfriend telephoned him late at night on June 14, telling him she was stranded in Baker and needed help. He tried to find some way of getting there other than driving, since he

had been drinking. He was unsuccessful, however, and began driving to Baker at about 1:00 a.m. Before reaching Baker, his van began losing power due to problems with the alternator. He used a call box to ask the CHP for assistance.

Lucero had 10 to 12 beers between 9:00 p.m. on June 14 and 1:00 a.m. on June 15, when he left Temple City. He had a 12-pack of beer in his van and drank four to six beers while driving. He drank one beer while waiting for assistance. This was more than he usually drank. Knowing it was illegal for him to drive after drinking, he would have "done everything in [his] power" to hide that fact from McKnight. He did not believe there was anything about the way he was talking or acting or walking that would indicate he had been drinking. He did not believe he had any problems with his driving on the way to the store that would have indicated to McKnight that he was intoxicated.

At about 5:30 a.m., Lucero was involved in an accident with a vehicle in which plaintiffs were riding. The accident occurred on Interstate 15 about 15 miles north of Baker. CHP Officer Larry Wayne Shupe responded to the scene. According to Officer Shupe's report, Lucero caused the accident by driving on the wrong side of the freeway. He was intoxicated at the time of the accident.

According to Officer Shupe, he could smell alcohol on Lucero's breath. Lucero showed signs of intoxication including red, watery eyes, nystagmus and slurred, unclear speech. Lucero told him that he had stopped in Baker, and that while he was in Baker, he had a few beers. Officer Shupe formed the opinion that Lucero had been driving under the influence.

McKnight was called to the crash scene. After he got there, he realized the van involved in the crash was the one he had serviced earlier, the one belonging to Lucero. According to Officer Shupe, McKnight told him that Lucero did not appear intoxicated during the earlier service call.

Lucero's blood was taken by paramedics after they arrived at the scene, at 6:45 a.m. A test showed his blood alcohol level to be .27 percent.

Lucero could not remember anything that happened from the time he left the store after the service call until the time he was arrested. He did not think he drank anything during that time.

Officer Shupe's report on the incident indicated that Lucero waived his rights and agreed to answer questions. Before any questions were asked, he acknowledged that he was in trouble. In response to questioning, he told the officer that he had ended work between 7:00 and 8:00 p.m. the previous evening. He bought a six-pack of beer, drank three beers immediately and three when he arrived home. His girlfriend called later; she told him she was stuck in Baker and needed money. He went to help her, buying a 12-pack of beer before he left town. His van broke down two times on the way. The first time, a county worker gave him a jump start. The second time, he used a call box and a tow truck arrived to give him a jump start. Each time he broke down, he drank a beer or two while waiting for help.

According to the report, Lucero told Officer Shupe that he found his girlfriend in Baker and helped her with her problems. After she drove away, he drank a few more beers. He then got on the freeway to go home. The next thing he remembered was crashing into a car. He did not realize that he had gotten on the freeway heading northbound. He did not know how he ended up driving the wrong way on the freeway. He did not know how fast he was driving.

Officer Shupe also contacted Lucero's girlfriend the following day. According to his report, she told him that she waited in Baker until 4:30 a.m., but Lucero never arrived. She borrowed money, fixed the car and drove home on her own. She never saw Lucero.

Plaintiffs' expert, Michael Slade, Ph.D., is a forensic toxicologist. He reviewed the deposition testimony of Officer Shupe, Lucero and McKnight, as well as the accident report and the results of Lucero's blood alcohol test. Based on these materials, it was his opinion that at the time McKnight assisted Lucero, Lucero's blood alcohol level would have been between .22 and .26. At this level, Lucero "would have been incapable of hiding his intoxicated state" and "would have been unable to drive his vehicle in a safe

manner." Lucero would have had the odor of alcohol on his breath, bloodshot eyes, slow and slurred speech, and slow movements. He would have driven erratically. His intoxicated state "would have been obvious to any person with whom he came in contact."

CONTENTIONS

I

Plaintiffs contend the trial court erred in granting summary judgment in defendants' favor on their cause of action for negligence, in that defendants owed them a duty of care, and there is a triable issue of material fact as to whether defendants breached that duty.

II

Plaintiffs further contend defendants may be held liable for civil conspiracy to violate Vehicle Code sections 23152 and 14607.

III

Plaintiffs also assert they have a cause of action against defendants for breach of contract, in that they are third party beneficiaries of the Tow Service Agreement.

DISCUSSION

I

Plaintiffs contend the trial court erred in granting summary judgment in defendants' favor on their cause of action for negligence, in that defendants owed them a duty of care, and there is a triable issue of material fact as to whether defendants breached that duty. We disagree.

We begin our discussion by setting forth the standard of review. Summary judgment properly is granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar*, *supra*, at p. 849.) The defendant "must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial." (*Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1242, 1245; accord, *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) He or she may not rely on the pleadings (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar*, *supra*, at p. 849), except to the extent they are uncontested by the parties (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 626).

On appeal, this court exercises its independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to

judgment as a matter of law. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at pp. 334-335.) Inasmuch as the grant or denial of a motion for summary judgment strictly involves questions of law, we must reevaluate the legal significance and effect of the parties' moving and opposing papers. (*Chevron U.S.A., Inc. v. Superior Court*, *supra*, 4 Cal.App.4th at p. 548.) We must uphold the judgment if it is correct on any ground, regardless of the reasons the trial court gave. (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419.)

Two basic principles of law are applicable here. The first, codified in Civil Code section 1714, is that "[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person." (Subd. (a).) The second is that, absent a special relationship, a person has no duty to control the conduct of another in order to prevent the other from harming a third person. (*Knighten v. Sam's Parking Valet* (1988) 206 Cal.App.3d 69, 73-74; *Fuller v. Standard Stations, Inc.* (1967) 250 Cal.App.2d 687, 690.)

Based on the second principle, courts held for many years that one who provides liquor to an intoxicated person is not liable for injuries caused by that person. (*Fuller v. Standard Stations, Inc.*, *supra*, 250 Cal.App.2d at p. 690.) In *Fuller v. Standard Stations, Inc.*, the court extended this holding to a service station operator selling gasoline to an intoxicated motorist, who then injures a third person. (*Id*. at pp. 693-694.) It saw "no significant distinction of logic, social policy or law" between one who sells liquor to an intoxicated person and one who sells gasoline to the same person. (*Id*. at p. 693.) "Each purveys a different commodity, but these commodities play parallel roles in the combination of circumstances culminating in foreseeable injury." (*Ibid*.)

Thereafter, courts began to rely on the first principle to impose liability on one who furnished liquor to an intoxicated person. (See, e.g., *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, 325; *Vesely v. Sager* (1971) 5 Cal.3d 153.) In response, the Legislature amended Civil Code section 1714 to abrogate the cases "and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries

incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person." (Subd. (b).)

Following the amendment of Civil Code section 1714, courts again relied on the second principle in declining to impose a duty on those who furnish liquor or otherwise assist an intoxicated person. For example, in *Jackson v. Clements* (1983) 146 Cal.App.3d 983, the court declined to impose liability on police officers who investigated a party where alcohol was being served to intoxicated minors but failed to take any action to stop the consumption of alcohol by minors at the party or to prevent the intoxicated minors from driving. (At pp. 985, 988-989.) The officers had no special relationship with either the intoxicated minors or the third party whom they injured, so no duty was imposed on them to prevent the minors from consuming alcohol or driving. (*Id*. at pp. 988-989.)

Similarly, in *Harris v. Smith* (1984) 157 Cal.App.3d 100, a police officer stopped a speeder, administered a field sobriety test, then let him go, warning him to slow down. The man subsequently caused an accident. (At pp. 102-103.) Again, the court held there was no special relationship establishing a duty of care. (At p. 109.)

In *DeBolt v. Kragen Auto Supply, Inc.* (1986) 182 Cal.App.3d 269, a guest became intoxicated at a party given by defendant and was ordered to leave. Defendant knew she would leave in her car but made no attempt to provide alternate transportation. The guest drove away and subsequently caused an accident. (At pp. 271-272.) As with the cases involving police officers, the court found no special relationship imposing a duty of care. (*Id.* at p. 276.) The court reiterated that the amendment to Civil Code section 1714 made the consumption of alcoholic beverages the proximate cause of injuries inflicted by an intoxicated person. (*Id*. at p. 274.) Thus, defendant could not be held liable for ejecting the guest from its party or failing to provide her with alternate transportation. (*Id*. at p. 275.)

Knighten v. Sam's Parking Valet, supra, 206 Cal.App.3d 69 presented a factual situation analogous to that of the instant case. In *Knighten*, defendant provided valet parking service for a restaurant. It returned car keys to an obviously intoxicated restaurant patron. She drove from the parking lot and struck plaintiffs. (At p. 72.) The court began its analysis of the case with the principle that absent a special relationship, one owes no duty to control another's conduct. (*Id*. at pp. 73-74.) It then reviewed the holdings of *Jackson*, *DeBolt* and similar cases and analogized the case before it to those cases. (*Id*. at p. 74.) "Like the police officers in these cases, [defendant was] in temporary control of the car, and failed to act to prevent further use of the car by an intoxicated driver. If police officers have no special relationship with intoxicated citizens under such circumstances, [defendant] can hardly be said to have any such relationship . . . . Similarly, if police officers have no duty to protect the general public by preventing drunk driving, restaurants and parking services can hardly be charged with such a duty." (*Ibid*., fn. omitted.)

There is no meaningful distinction between a parking valet giving car keys to an intoxicated motorist and a tow truck operator giving a jump start to an intoxicated motorist. Both acts enable the motorist to drive away. Both actors "fail[] to act to prevent further use of the car by an intoxicated driver." (*Knighten v. Sam's Parking Valet*, *supra*, 206 Cal.App.3d at p. 74.) Thus, the tow truck operator, like the parking valet and the police officer, has "no duty to protect the general public by preventing drunk driving." (*Ibid*.)

Plaintiffs argue that in the instant case, a special relationship between them and defendants was created by the Tow Service Agreement, which required participants to "use all 'procedures necessary for safe towing and recovery.'" What the agreement actually provides is that a participant "shall ensure that tow truck drivers responding to calls initiated by the CHP are qualified and competent employees of his/her company. The [participant] shall ensure that the tow truck drivers are trained and proficient in the use of the tow truck and related equipment, including, but not limited to, the procedures

necessary for the safe towing and recovery of the various types of vehicles services through CHP rotation." The agreement goes on to list driver licensing requirements.

There is nothing in the foregoing which creates a duty to the public on the part of participants to protect them from intoxicated motorists. If this provision was designed to protect anyone, it would be the drivers whose cars are towed. It is intended to provide them with competent towing services. Nothing in the Tow Service Agreement addresses encounters with intoxicated drivers. It cannot therefore be interpreted to create a duty on the part of participants to protect the public from intoxicated motorists. This is especially true in light of the fact that the CHP, at whose request the participants act, has no such duty. (*Knighten v. Sam's Parking Valet, supra,* 206 Cal.App.3d at p. 74.)

Plaintiffs also rely on Active Towing's unwritten policy that if a tow truck driver encountered an intoxicated driver while on a service call, the tow truck driver should not provide service but instead should contact the CHP. They cite no authority for the proposition that such an internal policy creates a duty to the public. In *Knighten,* the court held that the fact the parking valet had in the past withheld keys from intoxicated motorists did not create a special relationship with the intoxicated motorist in question or with the plaintiffs. (*Knighten v. Sam's Parking Valet, supra,* 206 Cal.App.3d at pp. 74-75.) Their past acts did not create a duty to do the same in the future. (*Id*. at p. 75.) Similarly, Active Towing's internal policy did not create an ongoing duty to the public. (*Ibid*.)

Plaintiffs next rely on section 324A of the Restatement Second of Torts and *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142. In *Williams*, a patron went to defendant's restaurant and gave his car keys to restaurant employees. The employees served him drinks and he became intoxicated. They then returned his keys to him and he drove away, causing an accident which injured plaintiff. (At pp. 145-146.) Under these facts, there was no duty to plaintiff. (*Id*. at p. 148.)

There was additional evidence of an understanding between the restaurant manager and the patron that the patron's car keys would not be returned to him unless he

was able to drive. (*Williams v. Saga Enterprises, Inc.*, *supra*, 225 Cal.App.3d at p. 150.) Based upon this evidence, plaintiff asserted that the manager's acting as a "good Samaritan" made Civil Code section 1714's liability limitation inapplicable "and place[d] it within the parameters of section 324A of the Restatement Second of Torts. That section states: 'One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if, [¶] (a) his failure to exercise reasonable care increases the risk of such harm, or [¶] (b) he has undertaken to perform a duty owed by the other to the third person, or [¶] (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.'" (*Williams*, *supra*, at p. 151, fn. omitted.)

The court agreed with the plaintiff. It concluded that the evidence the patron gave his keys to restaurant employees in order to keep himself from driving under the influence was sufficient to create a triable issue of fact as to the applicability of section 324A of the Restatement Second of Torts. (*Williams v. Saga Enterprises, Inc.*, *supra*, 225 Cal.App.3d at p. 151.)

What distinguishes *Williams* from similar cases is "evidence that defendant voluntarily assumed a duty" of protection (*Rotman v. Maclin Markets, Inc.* (1994) 24 Cal.App.4th 1709, 1718). Such evidence is missing in the instant case. There is no evidence that, by virtue of the Tow Service Agreement, Active Towing voluntarily assumed the duty to protect the public by preventing intoxicated motorists from driving. The mere fact that it had a policy not to provide service to intoxicated drivers but instead to contact the CHP is not enough. (*Knighten v. Sam's Parking Valet*, *supra*, 206 Cal.App.3d at p. 75.)

Plaintiffs also attempt to analogize the instant case to cases in which "police had intervened to the point of arresting the drunk driver, but negligently secured the vehicle or the arrestee himself afterwards." (*Knighten v. Sam's Parking Valet*, *supra*, 206

Cal.App.3d at p. 74, fn. 1.) In such cases, a duty of care arose "upon a deliberate act of intervention beyond the mere temporary detention of a drinking driver." (*Ibid*.) "Good Samaritan" standards were applied, allowing plaintiffs to proceed. (*Ibid*.)

Here, there was no deliberate act of intervention to prevent an intoxicated motorist from driving. As discussed above, defendants did not assume the role of "Good Samaritans" by voluntarily taking on a duty of protection. Thus, the cases relied upon by plaintiffs do not apply. (*Rotman v. Maclin Markets, Inc., supra*, 24 Cal.App.4th at p. 1718; *Knighten v. Sam's Parking Valet, supra*, 206 Cal.App.3d at p. 74, fn. 1.)

Finally, plaintiffs argue that liability may be imposed upon defendants based upon their having created an unreasonable risk of harm, relying on *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40. *Weirum* holds that a duty of care may be imposed when one's actions create an unreasonable risk of harm to third persons. (At pp. 46-49.) However, *Weirum* must be read in conjunction with Civil Code section 1714, subdivision (b), which precludes the imposition of liability for furnishing alcoholic beverages or other assistance to an intoxicated driver and makes the consumption of alcoholic beverages the proximate cause of injuries inflicted upon another by an intoxicated driver. (*Knighten v. Sam's Parking Valet, supra*, 206 Cal.App.3d at p. 74; see also *Fuller v. Standard Stations, Inc., supra*, 250 Cal.App.2d at pp. 693-694.)

As a matter of law, defendants owed no duty to plaintiffs. Therefore, summary judgment properly was granted as to plaintiffs' negligence cause of action. (Code Civ. Proc., § 437c, subd. (c).)

II

Plaintiffs further contend defendants may be held liable for civil conspiracy to violate Vehicle Code sections 23152 and 14607. Again, we disagree.

In support of this contention, plaintiffs cite *Brockett v. Kitchen Boyd Motor Co.* (1968) 264 Cal.App.2d 69. *Brockett* makes no reference to civil conspiracy principles.

Instead, the decision is based upon the existence of a special relationship between defendant and the intoxicated motorist, an employee, and defendant having induced its employee to commit a crime, driving under the influence. (At pp. 71, 73-74.)

Here, as discussed in part I, *ante*, there was no special relationship between defendants and Lucero. Additionally, there is no evidence McKnight induced Lucero to drive under the influence, e.g., that he led Lucero to his van, placed him inside of it and directed him to drive away. (*Brockett v. Kitchen Boyd Motor Co.*, *supra*, 264 Cal.App.2d at p. 72.) The undisputed evidence was that McKnight in his tow truck escorted Lucero in his van to the market in order to obtain payment for the services rendered. Therefore, *Brockett* does not apply as a matter of law. Summary judgment properly was granted as to this cause of action. (Code Civ. Proc., § 437c, subd. (c).)

III

Plaintiffs also assert they have a cause of action against defendants for breach of contract, in that they are third party beneficiaries of the Tow Service Agreement. There is no merit to the assertion.

The Tow Service Agreement specifically provi ded that a company participating in the program does not have "a contractual relationship with the CHP." In other words, the Tow Service Agreement is not a contract. Although titled an agreement, it is, by its own terms, simply a statement of the "rules and regulations that a company agrees to comply with in order to receive a rotation tow listing with the California Highway Patrol (CHP)." Absent a contract, there is no action for breach. (See *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1067; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 662, p. 601.) Summary judgment thus properly was granted on this cause of action as well. (Code Civ. Proc., § 437c, subd. (c).)

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J.

MALLANO, J.